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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5076 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.
2. To be referred to the Reporter or not? Yes.
3. Whether Their Lordships wish to see the fair copy of the judgement? No.
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.
5. Whether it is to be circulated to the Civil Judge?
No.

KETUL S SHAH

Versus

MANAGING DIRECTOR

Appearance:

MR PS CHARI for Petitioners
MR BR GUPTA for Respondent No. 1
NOTICE SERVED BY DS for Respondent No. 2
MR YS LAKHANI for Respondent No. 5

CORAM : MR.JUSTICE S.D.PANDIT

Date of decision: 02/09/98

CAV JUDGEMENT

Rule. In the facts and circumstances of the case
and with the consent of the parties, petition is taken up

for final hearing. Though the learned advocate for the respondent nos.1 to 3 Mr. Gupta was told that if the respondent nos.1 to 3 wants to file additional affidavit they are at liberty to do so but he submitted that he will proceed with the final hearing of the matter on the basis of the pleadings and material on record and accordingly petition is finally heard.

2. Mr. Ketul Shah and six others have filed the present petition of getting the declaration that the petitioners are entitled to be regularised as a permanent employees of the respondent no.1, and to get the wages of the regular employees of the respondent Gujarat State Handicrafts Development Corporation (hereinafter referred to as the Corporation). It is case of the petitioners that respondent-corporation is a wholly owned by State of Gujarat and the said corporation is having its processing units, central stores, quality control department and other departments at Ahmedabad, and have also got branches at Vadaaj, Vatva and other places. The seven petitioners in this petition are working in the categories of helpers and clerks as per the details given in the chart at Annexure 'A'. It is their claim that they were working continuously since 1991, but, in spite of this, the respondent-corporation had not regularised their services and respondent-corporation is not also paying their legitimate wages as well as other service benefits. It is further stated that in order to avoid the payment of the regular wages to the labourer, the corporation had bogusly introduced respondent no.5 P.R. & Company as a contractor for supplying the contract labourers. The said is done with a view to deprive the petitioners of their fundamental and statutory rights of getting the benefits of permanency and regular wages. They have come before this court with the following prayers:

"(a) to declare that the petitioners are entitled to regularization, permanency and wages of regular and permanent employees and to direct payment of all arrears of pay to the petitioner employees and to grant all benefits flowing from regularization with retrospective effect."

"(b) pending the admission and final disposal of this petition the Hon'ble Court be pleased to direct the respondent Corporation to provide work to the petitioners and to pay to the petitioners the wages drawn by the regular employees."

"(c) to grant to the petitioners any other

appropriate relief in the interest of justice."

"(d) to allow this petition with costs."

3. The respondent no.1 to 3 have filed the counter affidavits when the notice of this petition was issued. It is contended by the respondent no.1 to 3 that the petition is not tenable in law. It is contended that seven petitioners cannot jointly file this petition as the cause of action for each of them is different and distinct. It is further contended that the reliefs which the petitioners seeking are squarely covered by provision of Industrial Disputes Act, 1947 (hereinafter referred to as the Act), and the proper forum for the petitioners are to approach proper forum under the Industrial Disputes Act. The disputed question of fact involved in this petition and therefore the present petition should not be entertained. It is further contended that prayer for getting monetary claim is having within the provision of section 33-C of the Act, and the same could not be entertain and decided in this writ petition. It is further contended that there is no relationship of employees and employer between the petitioners and the respondent no.1 to 3, therefore, the petitioners are not entitled to get any relief.

4. The respondent no.5 has filed his affidavit-in-reply. He has supported the claim of the petitioners by contending that the corporation was the actual employer of the petitioners. The respondent-corporation was handing over the amount of the monthly wages to him and he was making payment of the same to the petitioners. He was getting only commission for this work and he was not the employer of the petitioners but the corporation is the employer of the petitioners. He also supported the claim of the corporation that the petitioners should be relegated to have appropriate remedy available to them under the provisions of the Industrial Disputes Act.

5. As per the claim of all the seven petitioners they are working with the respondent-corporation. It is their further claim that they are working continuously with the respondent-corporation but in spite of the same they are not regularised. They have averred in the petition that the respondent-Gujarat State HandiCrafts Development Corporation is wholly owned by State Government, and the 'State' as defined under Article 12 of Constitution of India. The claim of the petitioners that respondent-corporation is wholly owned by State

Government is not at all denied and disputed by the respondent no.1 to 3, in the affidavit filed on their behalf. The petitioners are seeking one and the same relief against one and the same employer, and therefore, if they joined themselves in one petition, it could not be said that their petition is barred in law because they have got a common cause of action against the employer as per their case and therefore they can join themselves together as petitioners in one petition.

6. The next question is to be considered as to whether the petitioners should be relegated to the Labour Court or Industrial Tribunal for getting the relief sought for by them in this petition. It is settled law that even if alternative forum is available to the petitioners, it could not be said that the High Court has no jurisdiction under Article 226. Generally when the alternative forum is available, High Court is reluctant to entertain petition filed by the workman directly in the court. In the instant case, the respondent is a State authority. It is always expected that the State authority should be an ideal employer and the State authority should not follow "unfair labour practice". The material on record shows that even in spite of the service of the notice in this petition, the respondent-corporation has gone to inform the respondent no.5 that the services of the present petitioners are not required by the respondent-corporation. This conduct of the respondent-corporation indicates and shows that he has no desire to respect law and to wait for taking any action till the final disposal of the matter. Therefore, in these circumstances, if the petitioners are relegated to the Industrial Tribunal, then they are likely to be thrown in the street. Therefore, in these circumstances, I am of the view that all the petitioners did not be relegated to the Labour forum if from the material on record this court is in opinion to give them some relief.

7. The petitioners have produced certain documents alongwith this petition. In the Annexure 'A' to the petition, the petitioners have given statement in proforma which shows the date of joining each of the petitioners with the respondent-corporation as an employer, what is the status of each of the employee and what wages they are drawing. The said annexure 'A' shows that out of the seven petitioners, petitioner no.3 is employed on 7.6.84, petitioner no.2 is employed from 8.9.1989, petitioners no.4,5 & 7 have joined on service from 1.9.1991, 1.10.1991 and 4.11.1991 respectively, whereas petitioner no.1 and 6 have joined on service from 8.6.1992 and 1.8.1992 respectively. The Annexure 'B' is

the office note issued by the Deputy Manager of Gujarat State Handicrafts Development Corporation Ltd., on June 9, 1998. In the said office note, it is mentioned that the services of the members of the staffs are being assigned on deputation to other department. The name of petitioner no.1 appears in this order at Serial No.3. Therefore this office note itself shows that petitioner no.1 was the member of the staff of the respondent-Corporation. If at all the petitioner no.1 was a contract labour then the corporation had no authority to transfer him or to send him on deputation. The contractor had already filed affidavit in support the claim of the petitioners that the petitioners are the employees of the corporation and they were not his employees. If that affidavit alongwith this office note is considered, then the claim of the petitioner no.1 Ketan Sureshbhai Shah that he is the employee of the respondent and that he is not the contract labour will have to be accepted, when he is in service with the corporation since 1992 as has been stated in Annexure 'A', the regularization of his service in the post held by him will have to be given and the corporation must be directed to regularise him from the date of this petition.

8. The petitioners have produced the documents from page no.12 to page no.34. Out of these documents, the documents at page no.18, 23 and 27 are pertaining to petitioners no.2,3 and 4. These documents are prepared by the corporation and it is having the signature of both employees as well as corporation manager. In the said statement of the details of the service record of the employees, it has been mentioned that petitioners no.2 continued to work as a clerk from 1.10.1993, petitioner no.3 from 19.9.92 and petitioner no.4 from 1.10.94. The petitioners no.2 and 4 are working as helpers as per the said statement. No doubt in the said statement it has been mentioned that they are the contractual worker but no material is produced to show that the corporation is holding a registration under the Contract Labour (Regulation & Abolition) Act, 1970. The contractor himself had not accepted the claim of the corporation and had supported the claim of the petitioners that the petitioners are the employees of the corporation. The petitioners have also averred that in order to deprive the benefits of labourer laws. The respondent corporation has not produced any material to show that there are genuine labour contracts. All the above circumstances show that the so-called contract sham and bogus. Therefore, in these circumstances, the petitioners no.2 to 4 must be given protection and they

must be given regularization. It is very pertinent to note that in the affidavit-in-reply, the corporation had not given any details regarding the contract and had not produced any material on record to show that the valid contract subsist between them and respondent no.5. Therefore, in these circumstances, the claim of the petitioners no.2 to 4 will have to be accepted.

9. As regards the petitioners no.5 to 7 they will have to go before the appropriate authority by raising an industrial dispute regarding their claim. It is very difficult to come to a definite conclusion either in favour of the petitioners no.5 to 7 or against them in view of material on record and the claim made by them will have to be decided by recording the oral evidence and for that purpose they will have to go before the labour authorities.

10. As regards petitioners no.2 to 4 in view of the documents at page no.17,23 & 27 and the affidavit-in-reply filed by respondent no.5, their claim will have to be accepted. In the case of Hussainbhai, Calicut Vs. Alath Factory Thozhilali Union, Calicut and others - 1978 Labour Law Journal 397. The following principles are laid down:

"The petitioner, owner of a rope-making factory, had engaged a number of workmen, through contractors and an industrial award came to be passed. The petitioner contended before the High Court that the workmen were not his and that they were the contractors' workmen. A single judge as well as the Division Bench negatived his contention. Hence this special leave petition."

"Held, in Ganesh Bidi Case, (1974-I L.L.J. 367), the Supreme Court has said that mere contracts are not decisive and the complex of considerations relevant to the Indian condition was necessary."

"The true test may be indicated once again. Where a worker or group of workers labours to produce goods or services and these goods or services are for the business of another, that other is, in fact, the employer. He has economic control over the workers' subsistence, skill, and continued employment. If he, for any reason, chokes off, the worker is virtually laid-off. The presence of intermediate contractors with whom alone the workers have immediate or direct

relationship ex contractu is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discover the naked truth, though draped in different paper arrangement, that the real employer is the management, not the immediate contractor. Myriad devices, half-hidden in fold after fold of legal form depending on the degree of concealment needed, the type of industry, the local conditions and the like may be restored to when labour legislation costs welfare obligations on Articles 38, 39, 42, 43 and 43A of the Constitution. The Court must be astute to avoid the mischief and achieve the purpose of the law and not be misled by the maya of legal appearances."

In my opinion, the case of the petitioners no.1 to 4 is covered by the said decision of the Apex Court.

11. No doubt the respondent-corporation is a State Government Corporation and usually the contention is raised about the financial difficulties. It is very pertinent to note that in the affidavit-in-rejoinder the Corporation had not given any details as to nature of the work the petitioners nos.1 to 4 are doing, what is the position of their work as well as what is the financial position of the corporation. In the case of Chief Conservator of Forests and another Vs. Jagannath Maruti Kondhare - AIR 1996 Supreme Court 2898, it has been observed by the Apex Court as under:

"In so far as the financial strain on State exchequer is concerned, which submission is sought to be buttressed by Shri Dholakia by stating that in the Forests Department itself the casual employees are about 1.4 lacs and if all of them were to be regularised and paid at the rate applicable to permanent workmen, the financial involvement would be in the neighborhood of Rs.300 crores a very high figure indeed. We have not felt inclined to bear in mind this contention of Shri Dholakia as the same has been brought out almost from the hat. The argument relating to financial burden is one of despair or in terrorem. We have neither been impressed by the first nor frightened by the second in as much as we do not intend that the view to be taken by us in these applies should apply, proprio vigore, to all casual labourers of the Forests Department or any other Department of the Government."

The above observations will makes it clear that financial difficulties could not be a ground to reject the regularization.

12. Mr. Gupta, learned advocate for the petitioners has cited before me the cases of MUNICIPAL CORPORATION OF DELHI Vs. GANESH RAZAK AND ANOTHER - (1995) 1 Supreme Court cases 235, THE RAJASTHAN STATE ROAD TRANSPORT CORPORATION AND ANOTHER Vs. KRISHNA KANT - AIR 1995 Supreme Court 1715 and in the case of PRAKASH COTTON MILLS PVT.LTD Vs. RASHTRIYA MILLS MAZDOOR SANGH - AIR 1986 Supreme Court 1514. But none of these cases are applicable on facts to the case before me. In the first case of Municipal Corporation of Delhi (Supra), it has been held that in a proceedings under section 33-C(2) the jurisdiction of the Labour Court is like that of executing court and therefore without a prior adjudication or recognition of the disputed claim of the workmen to be paid at the same rate as the regular employees, proceedings for computation of the arrears of wages claimed by them on that basis not maintainable under section 33-C(2). In the case of Rajasthan State Road Transport Corporation and another (Supra), there was question of considering the jurisdiction of civil court to entertain labour matter under section 9 of CPC. In the case of Prakash Cotton Mills Pvt. Ltd. (Supra), the question was regarding the consideration of the claim of the compensation on the closure of the mills and it has been held that the badli workmen have no guaranteed right of employment were not entitled to any compensation for the closure.

13. Thus in view of the above discussion, I hold that the claim of the petitioners no.1 to 4 will have to be allowed. The petitioners no.1 to 4 are working for more than four years prior to the date of the petition and they are employees of the respondent-Gujarat State Handicrafts Development Corporation, their services will have to be regularised from the date of the petition and they will be entitled to get the wages as a regular employee from the date of the petition. As regards the claim of the petitioners no.5 to 7 their claim depending on the oral evidence, the same will have to be adjudicated before the appropriate labour authority. I therefore relegate to approach the necessary labour authority.

14. Thus, I hold that the present petition will have to be partly allowed. The respondent no.1 to 3 are hereby directed do regularize the services of the

petitioners no.1 to 4 from the date of the petition and do pay them the wages of a regular workmen of the category which they are holding from the date of the petition. The petitioners no.5 to 7 are relegated to appropriate authority to get their relief sought for by them. As regards the arrears of difference of pay and wages from date of petition till 31-8-98 the same should be paid on or before 31-12-98.

15. The Rule is made absolute in the above terms. But in the circumstances of the case, the parties are directed to bear their respective costs.

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